No. 19975

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. GRAVEN, *Plaintiff,*

v.

ARTHUR PASA, *Defendant,*

Appellants,

USIBELLI COAL MINES, INC., *Intervenor,*

GENERAL ACCIDENT FIRE and LIFE ASSURANCE CORPORATION, LTD., a corporation, and POTOMAC INSURANCE COMPANY, a corporation, d/b/a GENERAL ACCIDENT GROUP, *Third Party Defendants,*

Appellees.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES L. POWELL, *Judge*

BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF CASES

Page

RULES

TEXTS

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COUNTER STATEMENT OF THE CASE

Generally speaking the statement of the case provided by the appellants is satisfactory for the purposes of this appeal, but it contains some statements requiring a brief

counterstatement, and there are some additional facts appearing in the record which should be placed before the court in determining this appeal.

In their brief at page 7, the appellants state that "over this area (underground mining), defendant, Arthur Pasa, had supervision, charge and control." The appellants have not properly interpreted the evidence in this respect. It is quite clear from the record that Usibelli Coal Mines, Inc., an Alaskan corporation, has a coal mining operation located some 110 miles from Fairbanks and 10 miles from Suntrana, Alaska. The company operates an open pit, or coal stripping operation at this point, and two miles away operates its Suntrana underground mining operation. (R. P. 22) At the open pit operation it maintains its company mining offices where the president, Usibelli, had his office, and where desk space was maintained at the time in question for its general manager, Mr. William Waugaman, and its general superintendent of operations, Fred Savage. (R. P. 52-53) The defendant Pasa was an underground mine foreman, principally operating on the nightshift at the underground operation. (R. P. 24, 26-27) General superintendent Savage was in control of and had direct supervision over both the pit and underground operations. (R. P. 25, 83) He visited the underground operation each day, had his meals there in the evening, and talked to Pasa about the progress of the work that was going on at the underground operation each day; he inspected the

underground operation weekly, often being accompanied by Pasa in connection with his inspections, and Pasa consulted with him whenever emergent situations required him to do so. (R. P. 44, 54-56) Thus Fred Savage, the general superintendent, was the one who was personally present and in direct charge, supervision and control of the mining operations of the company, including its underground operation — not the defendant Pasa. (R. P. 25, 44, 54-55, 83)

It further appears from the record that the defendant Pasa was but one of the foremen at the operation, and that other foremen were employed there, equal in rank and pay, and all of them were subject to the supervision of superintendent Savage. (R. P. 31, 83-84) Pasa did not hire or fire the miners who worked there, exercising only disciplinary control over those who had been hired, always subject to control by his superiors. (R. P. 29)

The trial court made the following Findings of Fact:

"1. That on December 6, 1961, defendant Arthur Pasa was an underground foreman, employed by the intervenor Usibelli Coal Mines, Incorporated.

* * * * * *

"4. The defendant Pasa was in specific charge of the underground mining operation and was in specific charge of the operations at the Suntrana site, which Suntrana site was one of two work sites of the mining operations of the intervenor Usibelli Coal Mines, Incorporated. Defendant Pasa was not an officer,

director or stockholder of Usibelli Coal Mines, Incorporated. There were other foremen, equal in status and salary to defendant Pasa. Defendant Pasa was subject to the supervision of Mr. Waugaman, the General Manager of the corporation, as well as the officers of the corporation." (Tr. 75-78)

ARGUMENT OF APPELLEES

A. *Defendant Pasa Was Not An Executive Officer.*

The insurance policy in question was purchased by the Usibelli Coal Mines, Inc. from the third party defendants. They are the parties to the contract, and neither the plaintiff nor the defendant are parties to the insurance contract. That contract of insurance provides in paragraph III under "Definition of Insured" the following:

> "With respect to the insurance under coverages A, B, and D, the unqualified word 'insured' includes the named insured and also includes any executive officer, director or stockholder thereof, while acting within the scope of his duties as such, and any organization or proprietor, with respect to real estate management for the named insured. If the named insured is a partnership, the unqualified word 'insured' also includes any partner therein but only with respect to his liability as such."

Since it is conceded that Pasa is not a director or stockholder of the company, it only remains to determine whether he can be considered an "executive officer" of the Usibelli Coal Mines at the time of this accident. Clearly, he does not qualify as an executive officer.

The cases of *Bruce v. Travelers Insurance Company,* 266 F (2d) 781, (5th Cir. 1959) and *Employers Liability Assurance Corp. v. Upham,* 150 So. (2d) 595 (La. 1963) are well reasoned cases, directly in point, and should be decisive upon this issue.

In the *Bruce* case, *supra,* the court was dealing with a contention that a well drilling foreman named Collins, at all times under the supervision of an area superintendent of the Gulf Refining Company, was an "executive officer" of the company as that term was used in the policy of insurance. The Court of Appeals for the Fifth Circuit, speaking through Circuit Judge Wisdom, determined that the drilling superintendent was not an executive officer and stated as follows:

> "Nor can it be said a tool pusher or a ramrod or a supervisor at a well location functions in an executive capacity, as 'executive officer' is understood in the ordinary acceptance of the term. The term implies some sort of managerial responsibility for the affairs of the corporation generally and it imports a close connection with the board of directors and high officers of the company. Insurance policies should be construed liberally, but the words of a policy must be given the meaning they ordinarily bear. 'No strained or unusual construction should be given to any of the terms of a policy of insurance, in favor of the insurer or of the insured'. *Empire Life Insurance Co. v. Gee,* 1912, 178 Ala. 492, 60 So. 90, 92. Or, we add, in favor of a third party claimant."

In the *Upham* case, *supra,* the court was dealing with

a contention that one Shane, employed as a carpenter foreman by Upham Engineering Company, a general construction business, was an "executive officer" of the engineering company. It appeared from the evidence that Shane was not only under the direction of John D. Upham, but also of one Hoppmeyer ,general superintendent of the construction business. Although there was some evidence that Shane was occasionally referred to as a "superintendent", he himself conceded that he was actually hired as and was a foreman. He further admitted that there were other persons employed by the construction company in the same capacity as himself — that is, foreman. His duties consisted primarily of laying out work for his men, assigning the men to the work, and performing some general acts of supervision in connection with the job. He reported any unusual or emergent developments to his supervisor, Hoppmeyer. He described himself as a "plain foreman." The Louisiana court said:

> "None of the above facts are in dispute, and these, we think, clearly demonstrate that Shane's connection with Upham Engineering Company was not that of an 'executive officer' as we understand the term. He had no managerial authority nor anything to do with the operation of his employer's business, save in the capacity of workman — a carpenter-foreman."

The Louisiana court then supported its conclusion with a citation from the *Bruce* case, *supra*, set forth above, and then further cited from the *Bruce* case as follows:

> " 'The distinction between an agent or employee and an officer is not determined by the nature of the work performed, but by the nature of the relationship of the particular individual to the corporation. * * ' "

It is clear that the defendant Pasa had no managerial responsibility for the affairs of the coal mining company generally and had no connection with its Board of Directors or high officers. It is further clear, when the nature of his work is considered, that his relationship to the corporation was that of employee and not agent or officer.

In their brief, appellants rely upon *Gordon v. Industrial Accident Commission of California*, 249 Pac. 44, in urging that a foreman such as Arthur Pasa should be classified as an executive officer under an insurance policy. The *Gordon* case, or cases, are easily distinguishable when the nature of what was there involved is considered. The California court did *not* hold that a foreman of a gravel pit operation was an "executive officer" for the purposes of determining the applicability of an insurance policy. The first *Gordon* case, 249 Pac. 844, decided by the District Court of Appeal, Second District, determined that the foreman, one Schienle, was not a "managing representative" of his employer in the sense that he was one who was "invested with the general conduct and control of a particular place of business of a corporation" as that definition had been established in the prior case of *Horst*

Co. v. Industrial Accident Commission, 193 P. 105, 194 Cal. 180.

In the next *Gordon* case, 249 P. 849, the Supreme Court of California held that Schienle was "managing representative" as that term was used in the Workmen's Compensation Act of the State of California. Neither of these cases, particularly the second one, purports to hold that a person in the position of a foreman, or one in the same position as defendant Pasa in this case, would be an "executive officer" under an insurance policy as that term is ordinarily understood and used in business relationships.

It is clear under the only applicable authorities in point that the defendant Arthur Pasa was not an executive officer of the Usibelli Coal Mines as that term was used in paragraph III of the insurance policy involved.

B. *Defendant Pasa was not a proprietor with respect to real estate management.*

In this portion of their brief, appellants argue that a coal mine is real estate and that Pasa was a "manager" of a coal mine, and based upon these two assumptions they arrive at the *non sequitur* that he must, therefore, be a "proprietor, with respect to real estate management for the named insured." The trial court succinctly disposed of this contention in its oral decision in the following words:

> "I also feel that he was not the proprietor, as that term is used in the policy. He was a foreman who had charge of a crew and managed a crew. He didn't have any management of the real estate as such, in the strict terms of the definition of a proprietor or an operator of real estate. His duties there were only for the purpose of running the crew during the shift of which he was in charge." (R. P. 90)

In the first place, of course, Pasa was not a "manager", but he was a foreman of men who were engaged in working upon and mining coal from a property in which he, Pasa, had no ownership or interest of any kind. A "proprietor" is synonymous with "owner" as that term is ordinarily and usually defined, understood and used. *Black's Law Dictionary, Fourth Edition.* Defendant Pasa does not qualify under such a definition.

In *Golmon v. Fidelity & Casualty Company of New York, Inc.,* 146 So. (2d) 461 (La.) 1962, a corporation operated a golf course. There was general control by its president, but in his absence, three employees were in charge of the company property, one of whom maintained the fairways and greens, and two of whom were young boys whose duties were to be at the club house and there collect greens fees and rent golf clubs. These boys, who collected the greens fees and rented the clubs, were as much in charge of that particular part of the property and in control of it as was the defendant Pasa in this case. An accident occured which was claimed to be the responsibility of one of the boys then in charge of the club

house, and it was contended he was insured under the policy of the defendant insurance company as it is here contended that Pasa was covered by such a policy. The Louisiana court said:

> "Counsel for plaintiff also contends that J. Leonard Collier, Jr. is an insured under the omnibus clause of the policy issued by defendant's liability insurer in the instant case for the reason that the omnibus clause of the policy states, in part, that the unqualified word "insured" includes:
>
> ' * * * any organization or proprietor with respect to real estate management for the named insured.'
>
> Counsel for plaintiff cites no authority in support of his position, and after a review of the facts in the instant case, we are of the opinion that the duties of the said J. Leonard Collier, Jr. were of such a nature that he was an employee of the corporation rather that the proprietor managing real estate, and consequently, the omnibus clause of the policy is not applicable to the instant case."

Defendant Pasa was not a proprietor, nor did he have the management of any real estate as such at the time of this accident, and he was not insured under the policy in question.

C. *The proper construction of the insurance contract would not include Pasa as an insured thereunder.*

It is urged by the appellants that insurance contracts are to be strictly construed against the company issuing such contracts and in favor of the "party claiming cover-

age." The rule is that such contracts are normally construed liberally in favor of those who are parties to the contract and who have paid premiums in order to obtain the benefit of the coverage to be provided. Neither appellant can qualify as a party to the insurance contract in question, and they are in no position to urge that they are entitled to have any court strain the language of the policy in an effort to bring them under its coverage.

In any event, appellants are not really contending for a liberal construction of the policy in question, they are contending for a wholly unwarranted and unintended construction of clear and unambiguous language in the policy. What was said by Judge Wisdom in the *Bruce* case, *supra*, is peculiarly applicable to the contention which the appellants here make with respect to the construction to be placed upon the policy. Judge Wisdom said:

> "Insurance policies should be construed liberally, but the words of a policy must be given the meaning they ordinarily bear. 'No strained or unusual construction should be given to any of the terms of a policy of insurance, in favor of the insurer or of the insured'. *Empire Life Insurance Co. v. Gee*, 1912, 178 Ala. 492, 60 So. 90, 92. Or, we add, in favor of a third party claimant."

D. *It is the function of this court upon review to accept all findings of fact of the trial court unless they can be said to be clearly erroneous.*

It is suggested by the appellants that the evidence in this case is "undisputed" and that, accordingly, this court

"can completely review and render determinations as to all facts and law with respect to this case" (App. Br. 22). Appellees submit that under Rule 52 (a) of the Federal Rules of Civil Procedure, 28 *U.S.C.A.*, this court must accept any findings of fact of the trial court unless those findings are clearly erroneous. This court has so stated. *Bloom v. United States,* 272 F (2d) 215; *United States v. United States Gypsum Co.,* 1948, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746. This rule would apply even if the basic facts were undisputed as claimed by appellants. *Lundgren v. Freeman,* 307 F (2d) 104; *Commissioner of Internal Revenue v. Duberstein,* 1960, 363 U.S. 278, 80 S. Ct. 1190, 4 L. Ed. 2d 1218.

The Findings of Fact made by the trial court, which are pertinent on this appeal and which have been set forth in the counterstatement of the case herein, are abundantly supported by the evidence. The conclusions of law which the trial court drew from those facts are supported by the authorities, by common sense, and sound reason.

CONCLUSION

For all the reasons set forth herein, the Findings of Fact and Conclusions of Law of the trial court should be accepted and approved, and its decree should be affirmed by this court.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rnules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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Of Counsel for Appellees